(3)

No. 93-429

FILED
DEC 17 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

EPISCOPAL HOSPITAL, ET AL., PETITIONERS

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

21 pp

QUESTION PRESENTED

Whether a now-superseded Medicare reimbursement provision, 42 U.S.C. 1395ww(b)(4)(A), was implicitly incorporated into another now-superseded reimbursement provision, 42 U.S.C. 1395ww(d)(1)(A)(i)-(ii), from 1983 to 1987.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	7
Community Hosp. of Chandler, Inc. v. *Sullivan*, 963 F.2d 1206 (9th Cir. 1992)	14
Garcia v. *United States*, 469 U.S. 70 (1984)	10
Good Samaritan Hosp. v. *Shalala*, 113 S. Ct. 2151 (1993)	13
Hillsborough County Hosp. Auth. v. *Shalala*, No. 91-12-CIV-T-21B (M.D. Fla. Nov. 9, 1993)	15
Methodist Hosp. v. *Shalala*, 6 F.3d 829 (D.C. Cir. 1993)	15
Methodist Hosp. v. *Sullivan*, C.A. No. 90-1871-GAG (D.D.C. Sept. 20, 1991)	15
Sacred Heart Medical Center v. *Sullivan*, 958 F.2d 537 (3d Cir. 1992)	8, 10, 11, 13

Statutes and regulations:

Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6003(e)(1)(A)(ii), 103 Stat. 2142	13
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324	2
§ 101, 96 Stat. 332-334	2
42 U.S.C. 1395c	2
42 U.S.C. 1395f(b)	2, 9
42 U.S.C. 1395x(v)	2, 9

Statutes and regulations—Continued: Page

42 U.S.C. 1395ww(a) 9, 10
42 U.S.C. 1395ww(a)(1) 9
42 U.S.C. 1395ww(a)(4) 9
42 U.S.C. 1395ww(b)(1)(A) 3
42 U.S.C. 1395ww(b)(1)(B) 3
42 U.S.C. 1395ww(b)(3)(A) 2, 5, 7, 8, 9, 10, 12
42 U.S.C. 1395ww(b)(3)(A) (Supp. III 1991) 8
42 U.S.C. 1395ww(b)(3)(A)(i) 2
42 U.S.C. 1395ww(b)(3)(A)(ii) 3
42 U.S.C. 1395ww(b)(3)(C)-(E) (Supp. III 1991) 8
42 U.S.C. 1395ww(b)(4)(A) 3, 6-7, 8, 9, 10, 12, 13, 14, 15, 16
42 U.S.C. 1395ww(d) 3
42 U.S.C. 1395ww(d)(1) 4
42 U.S.C. 1395ww(d)(1)(A)(i)-(ii) 7, 8, 9, 12
42 U.S.C. 1395ww(d)(1)(A)(i)(I) 5
42 U.S.C. 1395ww(d)(1)(A)(i)(II) 5
42 U.S.C. 1395ww(d)(1)(A)(ii)(I) 5
42 U.S.C. 1395ww(d)(1)(A)(ii)(II) 5
42 U.S.C. 1395ww(d)(1)(B) 3
42 U.S.C. 1395ww(d)(1)(C) 5
42 U.S.C. 1395ww(d)(2) 4
42 U.S.C. 1395ww(d)(3) 4
42 U.S.C. 1395ww(d)(4) 4
42 U.S.C. 1395ww(d)(5) 5, 6
42 U.S.C. 1395ww(d)(5)(A)-(H) (Supp. III 1991) 5
42 U.S.C. 1395ww(d)(5)(C)(iii) 13
42 U.S.C. 1395ww(d)(5)(I) (Supp. III 1991) 6, 13
42 U.S.C. 1395ww(g) 4
42 C.F.R.:
Section 412.60 4
Section 412.62 4
Section 412.63 4
Sections 412.70-412.76 6
Section 412.71(b)-(c) 6, 12
Section 412.72(a) 6, 12
Sections 412.300 *et seq.* 4
Section 413.40 3
Section 413.40(c)-(i) 3

Regulations—Continued: Page

Section 413.40(g)(2) 3

Miscellaneous:

48 Fed. Reg. (1993):
p. 39,412 10
p. 39,418 10
49 Fed. Reg. (1984):
p. 234 12
p. 261 12
51 Fed. Reg. (1986):
p. 8208 13
p. 8209 13
H.R. Rep. No. 25, 98th Cong., 1st Sess. (1983) 4
S. Rep. No. 23, 98th Cong., 1st Sess. (1983) 11

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-429

EPISCOPAL HOSPITAL, ET AL., PETITIONERS

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 994 F.2d 879. The opinion of the district court (Pet. App. 11a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on June 18, 1993. The petition for a writ of certiorari was filed on September 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners seek retroactive increases in Medicare reimbursements for certain inpatient hospital care provided during the mid-1980s. Part A of the Medicare program provides elderly and disabled persons with "basic protection against the costs of inpatient hospital services, [related post-hospital,] home health services, and hospice care." 42 U.S.C. 1395c. Prior to 1983, hospital reimbursement under Part A was based primarily on the "reasonable cost" of covered services. 42 U.S.C. 1395f(b). The Medicare program defines "reasonable cost" to mean "the cost actually incurred," exclusive of costs "found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. 1395x(v).

In an effort to curb cost increases and encourage greater efficiency, Congress imposed new limits on Part A reimbursement as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. TEFRA left the basic retrospective, cost-based methodology of Part A reimbursement undisturbed, but added financial incentives and penalties to slow the rate of increase in reimbursements for inpatient hospital services. See TEFRA § 101, 96 Stat. 332-334.

TEFRA's rate-of-increase scheme was tied to a "target amount" for each hospital, which was defined in 42 U.S.C. 1395ww(b)(3)(A). For the hospital's initial cost reporting period, Subsection (b)(3)(A) defined "target amount" as "the allowable * * * costs of inpatient hospital services * * * recognized * * * for such hospital for the preceding 12-month cost reporting period." 42 U.S.C. 1395ww(b)(3)(A)(i). For

each subsequent reporting period, the target amount was increased annually by a specified percentage. 42 U.S.C. 1395ww(b)(3)(A)(ii). If a hospital's operating costs were less than the applicable target amount during a reporting period, the hospital received a bonus; conversely, if the hospital's operating costs exceeded the target amount, its reimbursement was reduced. 42 U.S.C. 1395ww(b)(1)(A) and (B); see generally 42 C.F.R. 413.40.

TEFRA also provided for exceptions and adjustments to the rate-of-increase limit on Part A reimbursements, under 42 U.S.C. 1395ww(b)(4)(A). Subsection (b)(4)(A) generally authorized the Secretary to "provide for such * * * exemptions from, and exceptions and adjustments to, [the rate-of-increase reimbursement] method as the Secretary deems appropriate." See generally 42 C.F.R. 413.46(e)-(i). Subsection (b)(4)(A) also specifically directed the Secretary to "provide for an exemption from, or an exception and adjustment to, the [rate-of-increase] method * * * where events beyond the hospital's control or extraordinary circumstances * * * create a distortion in the increase in costs for a cost reporting period." See 42 C.F.R. 413.40(g)(2).

2. In 1983, Congress replaced TEFRA's rate-of-increase limits with a more ambitious and far-reaching reform of Part A reimbursement, the Prospective Payment System (PPS).[1] See 42 U.S.C. 1395ww(d). Under the PPS, hospitals are reimbursed for inpatient costs on the basis of prospectively

[1] Several categories of hospitals have been exempted from the PPS and are still reimbursed under the prior TEFRA provisions. See 42 U.S.C. 1395ww(d)(1)(B). Petitioners do not fall within any of the exemptions and are subject to the PPS.

determined federal rates, rather than actual operating costs. 42 U.S.C. 1395ww(d)(1) and (4); see 42 C.F.R. 412.60.[2] The PPS provides for largely uniform payment rates based on national and regional reimbursement rates for each patient discharge category, known as a "diagnosis-related group" (DRG). 42 U.S.C. 1395ww(d)(2) and (3); see 42 C.F.R. 412.62, 412.63.

Because PPS reimbursement does not depend on an individual hospital's actual costs, reimbursement rates can be determined prospectively. If an individual hospital's costs exceed the prospective federal rates, the hospital must absorb the difference. Conversely, if the hospital's costs are lower than the prospective federal rates, the hospital keeps the difference. This reimbursement scheme was "intended to reform the financial incentives hospitals face, promoting efficiency * * * by rewarding cost[-]effective hospital practices." H.R. Rep. No. 25, 98th Cong., 1st Sess. 132 (1983).

In order "to minimize disruptions that might otherwise occur because of a sudden change in reimbursement policy," Congress phased in the PPS by creating a four-year transition period from 1983 to 1987. H.R. Rep. No. 25, *supra*, at 136. The reimbursement dispute in this case concerns this now-expired PPS transition period. During the transition period, inpatient hospital services were reimbursed on the basis of blended rates, which consisted of two components. The first component, known as the

---

[2] In October 1991, a separate prospective payment system was established for capital costs. See generally 42 U.S.C. 1395ww(g); 42 C.F.R. 412.300 *et seq.* Those provisions are not at issue here.

"hospital-specific portion" (HSP), was a specified percentage of the hospital's "target amount" for the cost reporting period. 42 U.S.C. 1395ww(d)(1)(A)(i)(I) and (ii)(I). The second component was a percentage of the prospective federal rate under the PPS. 42 U.S.C. 1395ww(d)(1)(A)(i)(II) and (ii)(II). Over the course of the four-year transition period, the portion of the reimbursement amount tied to the prospective rate became progressively larger and the HSP became progressively smaller. The HSP was phased out altogether after 1987, and the prospective rate then formed the exclusive basis for PPS reimbursement. 42 U.S.C. 1395ww(d)(1)(C).

The present case involves the calculation of the HSP's "target amount." To define the "target amount," Congress borrowed the definition it had used earlier in TEFRA, directing the Secretary to use "the hospital's target amount for the cost reporting period (as defined in subsection (b)(3)(A) of this section * * *)." 42 U.S.C. 1395ww(d)(1)(A)(i)(I) and (ii)(I). Thus, to calculate a hospital's "target amount" during the PPS transition period, the Secretary was required to determine the allowable costs during the 12-month reporting period preceding the first TEFRA year, known as the base year, and then increase that amount by the specified percentages for subsequent periods. See 42 U.S.C. 1395ww(b)(3)(A).

When Congress established the PPS, it provided in 42 U.S.C. 1395ww(d)(5) for various exceptions and adjustments, just as it had done earlier when it enacted TEFRA. That Subsection directed the Secretary to implement a number of specific exceptions and adjustments, 42 U.S.C. 1395ww(d)(5)(A)-(H) (Supp. III 1991), and also granted the Secretary general

authority to establish "such * * * exceptions and adjustments to * * * payment amounts under this subsection as the Secretary deems appropriate," 42 U.S.C. 1395ww (d)(5)(I) (Supp. III 1991). In contrast to TEFRA's analogous provision, however, Subsection (d)(5) does not direct the Secretary to adjust reimbursement amounts where "extraordinary circumstances" distort the increase in costs for a particular cost reporting period.[3]

3. Petitioners are short-term acute care hospitals that receive reimbursement for inpatient care under Part A of the Medicare program. Pet. App. 4a. Petitioners sought increases in their "target amounts" during the PPS transition period on the basis of TEFRA's Subsection (b)(4)(A). Petitioners asserted that a particular change in HHS reimbursement regulations in 1983, which occurred after the hospitals' base year but which would have increased their allowable costs during the base year if it had been in effect at that time, constituted an "event[] beyond the hospital's control or extraordinary circumstance[]" entitling them to an adjustment under TEFRA's Subsection (b)(4)(A).

The district court entered summary judgment in favor of the Secretary. Pet. App. 11a-23a, 24a. The district court assumed, without discussion, that Sub-

---

[3] The PPS's transition-period reimbursement provisions are implemented in regulations found at 42 C.F.R. 412.70-412.76. The regulations specify a limited number of situations in which the "target amount" used to calculate the HSP may be modified to reflect costs other than allowable base year costs. See 42 C.F.R. 412.71(b)-(c), 412.72(a). Notably, the regulations do not authorize modification of the target amount to take into account cost increases occurring after the base year.

section (b)(4)(A) remained in effect during the PPS transition period. The court held, however, that the 1983 regulatory change was not the kind of "event[] beyond the hospital's control or extraordinary circumstance[]" that Congress had meant to address in Subsection (b)(4)(A). Pet. App. 15a-23a.

The court of appeals affirmed. Pet. App. 1a-9a. Applying the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court sustained the Secretary's position that Subsection (b)(4)(A) did not apply during the PPS transition period. Pet. App. 6a-7a. The court held that while the statutory provisions governing the PPS transition period expressly incorporated Subsection (b)(3)(A), which defined "target amount," "[Subsection (b)(3)(A)] plainly d[id] *not* incorporate subsection (b)(4)(A)." Pet. App. 6a. In the alternative, the court held that, "[e]ven if we admit the possibility of other interpretations," the Secretary's reading of the Act "is a permissible one," and therefore must be upheld under *Chevron*. *Id.* at 7a.

ARGUMENT

The decision of the court of appeals is correct, and the question petitioners present is not of substantial continuing importance. Review by this Court therefore is not warranted.

1. a. Petitioners claim that 42 U.S.C. 1395ww (b)(4)(A) entitled them to adjustments in their Medicare reimbursements during the PPS transition period. As the court of appeals recognized, that claim has no basis in the statutory text. The specific provision governing reimbursement during the PPS transition period, 42 U.S.C. 1395ww(d)(1)(A)(i)-(ii),

made no reference whatsoever to Subsection (b)(4)(A). Congress explicitly incorporated into the PPS transition-period rules a different TEFRA provision, Subsection (b)(3)(A), which defined "target amount" under TEFRA. See 42 U.S.C. 1395ww(d)(1)(A)(i)-(ii); Pet. App. 6a-7a. Congress's explicit incorporation of Subsection (b)(3)(A), without reference to Subsection (b)(4)(A), greatly undermines petitioners' argument that Congress meant to incorporate the latter provision as well. See *Sacred Heart Medical Center* v. *Sullivan*, 958 F.2d 537, 545-546 & n.15 (3d Cir. 1992).

Petitioners assert (Pet. 12-13) that Subsection (b)(4)(A) is an integral part of the definition of "target amount" in Subsection (b)(3)(A). However, Subsection (b)(4)(A) did not purport to define "target amount" or to modify the definition of "target amount" found in Subsection (b)(3)(A). Instead, accepting that definition as a given, it authorized the Secretary to create "exemptions from, and exceptions and adjustments to," the "target amount." 42 U.S.C. 1395ww(b)(4)(A); see Pet. App. 6a.

When Congress wished to modify Subsection (b)(3)(A)'s basic definition of "target amount" by incorporating other statutory provisions, it said so explicitly in Subsection (b)(3)(A) itself. Thus, Subsection (b)(3)(A) begins with the proviso that, "[e]xcept as provided in subparagraphs (C), (D), and (E), * * * the term 'target amount' means [allowable operating costs during the base period]." 42 U.S.C. 1395ww(b)(3)(A) (Supp. III 1991).[4] Because Subsection

[4] The cited provisions modify the definition of "target amount" in particular circumstances, none of which applies here. See 42 U.S.C. 1395ww(b)(3)(C)-(E) (Supp. III 1991).

section (b)(4)(A) did not similarly alter or otherwise affect the basic definition of "target amount" in Subsection (b)(3)(A), it was not incorporated into the PPS when Congress directed the Secretary to use "the hospital's target amount * * * as defined in subsection (b)(3)(A)." 42 U.S.C. 1395ww(d)(1)(A)(i)-(ii).

b. Petitioners attempt to reinforce their Subsection (b)(4)(A) incorporation theory by pointing to a wholly separate statutory provision, 42 U.S.C. 1395ww(a). Subsection (a) provided that certain costs "shall not [be] recognize[d] as reasonable," and further prescribed what costs were to be treated as allowable costs under Medicare's general "reasonable cost" reimbursement standard. 42 U.S.C. 1395ww (a)(1) and (4); see generally 42 U.S.C. 1395f(b), 1395x(v). When Congress established the PPS transition period, it directed the Secretary to base reimbursement on the hospital's target amount "as defined in subsection (b)(3)(A) of this section, *but determined without the application of subsection (a)*." 42 U.S.C. 1395ww(d)(1)(A)(i)-(ii) (emphasis added). Petitioners argue that if Congress had meant for the Secretary to determine reimbursement solely on the basis of Subsection (b)(3)(A), without reference to other provisions such as Subsection (b)(4)(A), Congress would have had no reason explicitly to exclude Subsection (a) in this fashion. Petitioners reason that because Congress did not explicitly exclude Subsection (b)(4)(A), as it did Subsection (a), Congress meant implicitly to include Subsection (b)(4)(A). See Pet. 13-14.

This argument fails because Subsection (a), unlike Subsection (b)(4)(A), directly affects the definition of "target amount" in Subsection (b)(3)(A). Subsection

(b)(3)(A) defines "target amount" in terms of "the allowable * * * costs of inpatient hospital services" during the base year. 42 U.S.C. 1395ww(b)(3)(A). Subsection (a) of 42 U.S.C. 1395ww is one of many statutory provisions in the Medicare program that prescribes the "allowable costs" of inpatient hospital services. See generally 48 Fed. Reg. 39,412, 39,418 (1983) (explaining how cost limits under Subsection (a) affected the target amount under Subsection (b)(3)(A)). Because Subsection (b)(3)(A)'s definition of "target amount" turns on "allowable costs," and because Subsection (a) affected which costs were allowable, Congress had to exclude Subsection (a) in order to prevent it from affecting the determination of the "target amount" during the PPS transition period. In contrast, Subsection (b)(4)(A) does not affect the definition of "target amount," and Congress therefore did not have to exclude it affirmatively in order to prevent it from applying to the PPS transition period. See *Sacred Heart*, 958 F.2d at 546 n.18.

c. Petitioners further argue (Pet. 14-15) that the decision of the court of appeals is at odds with the legislative history. Given the clarity with which Congress spoke when it directed the Secretary to use the "target amount * * * as defined in subsection (b)(3)(A)," petitioners face a substantial burden in mining the legislative history to establish that Congress meant to incorporate Subsection (b)(4)(A) *sub silentio*. When a statute is unambiguous, "only the most extraordinary showing of contrary intentions" from the legislative history could justify a departure from the statutory text. *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).

Petitioners point to a brief passage in the Conference Report on the PPS legislation and fragmentary quotations from the Senate Report to support their position. See Pet. 14-15. But, as the Third Circuit has pointed out, the language in the Conference Report "do[es not] * * * indicate that Congress intended to retain the 'exceptional circumstances' provision [of Subsection (b)(4)(A)], since that exception is not referred to in the Conference Report." *Sacred Heart*, 958 F.2d at 547 n.21.[5]

2. Petitioners also take issue (Pet. 17-21) with the court's alternative holding that, "[e]ven if we admit the possibility of other interpretations," the Secretary's interpretation is a "permissible" one that is entitled to prevail under *Chevron*. Petitioners argue that the Secretary's position is not entitled to deference because it is contrary to the policies underlying the statute and is an "about-face" (Pet. 19) from the Secretary's original administrative interpretation.

According to petitioners (Pet. 18), Congress meant for the Secretary to use "as close a proxy as reason-

---

[5] The Senate Report's passing reference to "various other exceptions and adjustments" (S. Rep. No. 23, 98th Cong., 1st Sess. 49 (1983), cited by petitioners (Pet. 5-6 n.6), does not aid petitioners. As noted above, the PPS legislation contained a number of explicit exceptions, none of which is claimed to apply in this case. There is no reason to believe that the "various other exceptions and adjustments" mentioned in the Senate Report referred to anything other than those express statutory provisions. The other language petitioners quote from the Senate Report (see Pet. 6 n.6) referred to an entirely different and unrelated subject, the allocation of non-physician services between Part A and Part B of the Medicare program. See S. Rep. No. 23, *supra*, at 50.

ably possible to actual allowable hospital-specific costs that would be incurred during the transition period." That is not what the PPS says. The PPS transition period provisions directed the Secretary to use "the hospital's target amount * * * as defined in subsection (b)(3)(A)." 42 U.S.C. 1395ww(d)(1)(A)(i)-(ii). As explained, Subsection (b)(3)(A) defines the "target amount" by reference to allowable costs during a pre-PPS base year, not (as petitioners would have it) allowable costs during the subsequent PPS transition period.

Petitioners similarly err in suggesting (Pet. 19) that the Secretary's current interpretation is a "litigation position" that conflicts with her original administrative interpretation. When the Secretary promulgated the original regulations implementing the PPS transition provisions, the regulations specified a limited number of situations in which the target amount could be modified to reflect costs other than allowable base year costs. The regulations did not, however, authorize modification of the target amount to take account of the kinds of "extraordinary circumstances" covered by Subsection (b)(4)(A). See 42 C.F.R. 412.71(b)-(c), 412.72(a). That exclusion from the Secretary's implementing regulations demonstrates that the Secretary's current position is consistent with the original administrative interpretation.

It is true, as petitioners note (Pet. 19), that the preamble to the original rulemaking referred to Subsection (b)(4)(A) as a source of authority for adjusting base-period costs during the PPS transition period. See 49 Fed. Reg. 234, 261 (1984). But the Secretary corrected that reference in a later rulemaking

proceeding—one on which petitioners themselves rely (Pet. 19-20 n.20). See 51 Fed. Reg. 8208, 8209 (1986). In the latter proceeding, the Secretary explained that the regulations allowing adjustments during the PPS transition period "were issued in accordance with [42 U.S.C.] section [1395ww](d)(5)(C)(iii)," the PPS's own discretionary-authority provision. 51 Fed. Reg. 8209 (1986).[6] The Secretary thus clarified that Subsection (b)(4)(A) was not a source of authority for adjustments during the PPS transition period. See *Sacred Heart*, 958 F.2d at 548.[7]

Petitioners note (Pet. 19-20) that two hospitals received adjustments during the PPS transition period on the basis of Subsection (b)(4)(A). Those two cases were erroneous departures from the Secretary's governing interpretation of the statute. See *Sacred Heart*, 958 F.2d at 548 n.24. The fact that two hospitals received adjustments that were unwarranted under the PPS legislation does not compromise the Secretary's subsequent, considered administrative interpretation of that legislation, particularly since that interpretation has governed every other

---

[6] The provision referred to in this *Federal Register* notice as 42 U.S.C. 1395ww(d)(5)(C)(iii) was later recodified as 42 U.S.C. 1395ww(d)(5)(I) (Supp. III 1991), without substantive change, in 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6003(e)(1)(A)(ii), 103 Stat. 2142.

[7] This Court has recognized that the "Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation," and that courts should not approach statutory construction *de novo* simply because an administrative interpretation has evolved. *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993).

case arising during the PPS transition period, including this one.

In the end, it is academic whether the Secretary's interpretation of the statute is entitled to deference under *Chevron*. As the court of appeals recognized, the statutory provisions governing the PPS transition period create a precisely defined reimbursement calculus that simply does not incorporate Subsection (b)(4)(A). The statutory text alone thus refutes petitioners' position.

3. Petitioners urge (Pet. 10-11) the Court to grant certiorari to resolve a circuit conflict over the applicability of Subsection (b)(4)(A) during the PPS transition period. The D.C. Circuit's decision in this case and the Third Circuit's decision in *Sacred Heart* both hold that Subsection (b)(4)(A) did not apply during the transition period. In contrast, in *Community Hosp. of Chandler, Inc.* v. *Sullivan*, 963 F.2d 1206 (1992), the Ninth Circuit held— without the benefit of briefing by the Secretary[8]—that Subsection (b)(4)(A) did apply.[9]

---

[8] The Secretary did not brief the Subsection (b)(4)(A) issue in *Chandler* because the hospital had not raised that issue in the district court and therefore appeared to have waived it. Thus, it is not true that the Secretary's position in this case is "inconsistent * * * with the agency's position in *Chandler*" (Pet. 20). The Ninth Circuit chose to allow the hospital to raise the Subsection (b)(4)(A) issue for the first time on appeal, on the theory that the issue had been "constructively raised" when the hospital cited Subsection (b)(4)(A) (without arguing for its applicability) in the administrative and trial court proceedings. See *Chandler*, 963 F.2d at 1213.

[9] Petitioners assert (Pet. 10) that the decisions of "[n]umerous district courts" support their position. However, all but two of the decisions relied upon by petitioners (Pet. 11 n.13)

Despite the fact that the Ninth Circuit's decision conflicted with the Third Circuit's earlier decision in *Sacred Heart*, the government chose not to seek certiorari in *Chandler* because of the limited significance of the Subsection (b)(4)(A) issue. The legal controversy concerns an interim Medicare reimbursement scheme that expired more than five years ago. Review by this Court would have no significance for reimbursement in future Medicare cost reporting periods. Furthermore, only a limited number of reimbursement claims that involve the applicability of Subsection (b)(4)(A) during the PPS transition period remain pending. Even as to those claims, the significance of the issue is speculative. By its own terms, Subsection (b)(4)(A) affects only those exceptional cases where hospitals claim that "events beyond [their] control or extraordinary circumstances" distorted their costs. Even where Subsection (b)(4)(A) is invoked, it by no means follows that the resolution of the issue petitioners raise would affect the ultimate outcome of the reimbursement dispute. In this case, for example, the district court assumed that Subsection (b)(4)(A) did apply during the PPS transition period, but nonetheless ruled against petitioners, on the ground that they had-

---

were rendered by the District Court for the District of Columbia, and have now been superseded by the decision of the court of appeals in this case. See *Methodist Hosp.* v. *Shalala*, 6 F.3d 829 (D.C. Cir. 1993) (unpublished order) (reversing *Methodist Hosp.* v. *Sullivan*, C.A. No. 90-1871-GAG (D.D.C. Sept. 20, 1991) (cited at Pet. 11 n.13)). Also, since the filing of the certiorari petition, the Secretary has prevailed in *Hillsborough County Hosp. Auth.* v. *Shalala*, No. 91-12-CIV-T-21B (M.D. Fla. Nov. 9, 1993), cited by petitioners (Pet. 11).

failed to show the kind of "events beyond the hospital's control or extraordinary circumstances" that Subsection (b)(4)(A) requires. Pet. App. 16a-23a.

For the same reasons that the government declined to seek review in *Chandler*, review also is unwarranted in this case. While a circuit conflict exists, now as it did then, the conflict lacks the practical significance necessary to warrant resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys

DECEMBER 1993